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IN THE

Supreme Court of the United States

October Term, 1971.

Nos. 71-153 and 71-201.

McCLOSKEY & CO., INC. and McCORMICK-TAYLOR ASSOCIATES,
in No. 71-201,

Petitioners,

FRANK M. STEINBERG,
in No. 71-153,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JOHN ROGERS CARROLL,
Special Assistant District Attorney,
JAMES D. CRAWFORD,
Deputy District Attorney,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney,
Counsel for Responaent.

Room 666, City Hall
Philadelphia, Pennsylvania 19107

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STATEMENT OF THE CASE.

The Court of Common Pleas of Philadelphia quashed indictments against these petitioners on the ground that they had been denied preliminary hearings required by Rule 116 of the Pennsylvania Rules of Criminal Procedure. The Court consciously avoided the equal protection question by holding petitioners entitled to preliminary hearings as a matter of state law. The Pennsylvania Supreme Court reversed that state law decision and also observed that the historical classification of methods of instituting criminal proceedings in Pennsylvania, which allows indictment without preliminary hearings, *inter alia*, in cases where the presentment of an investigating grand jury detailing the evidence and naming the witnesses,[1] is approved by the convening court for submission to an indicting grand jury, is a reasonable classification.

Analyzing the reasons for the classification and its historical application, the Pennsylvania Supreme Court concluded that there was a rational basis for the distinction drawn and uniformly applied. That court also considered the actual effects of the different procedures on the ability of an accused to prepare his defense and found the advantage of a preliminary hearing illusory by comparison. It remanded the cases for disposition of other undecided pre-trial motions and trial. At that point these petitions were filed.

There is presently pending before this Court, in addition to the present petition, a petition of the Commonwealth of Pennsylvania in *Pennsylvania v. James C. McCloskey, Paul J. Marzullo and Thomas Taylor* as of October Term, 1971, No. 71-374, to which petition answers have been filed in this Court.

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[1] "As the record now before us discloses, a presentment is a rather complete summary of the grounds on which the investigating grand jury making its recommendation, and contains descriptions of both the physical evidence and the testimony which prompts its action." Pa. Supreme Court Opinion, p. 21, McCloskey petition, page 66.

REASONS FOR NOT GRANTING THE WRIT.

1. The Nature of the Investigating Grand Jury.

The Philadelphia investigating grand jury of March Term, 1969 sat for seventeen months, heard over four hundred witnesses; produced fifteen presentments which generated over 2,400 indictments against forty-six individuals and nineteen firms, including city officials and others doing business with the City on a wide variety of charges. Some of these cases have been tried, others are pending. This grand jury had investigating functions only; it did not indict. No investigating grand jury acting under the law of Pennsylvania may return an indictment.

Before a presentment is returned by such a Pennsylvania grand jury, a majority of its twenty-three members must find "probable cause" to recommend indictment. This is the same standard applied by the judge at a preliminary hearing. The grand jury hears testimony under oath in order to make its findings. It is controlled actually by the Court of Common Pleas, not by the prosecutor. It calls its witnesses as it chooses, not at the choice of the district attorney. All witnesses are sworn by the Court and as the opinion below makes clear, must be protected by the Court.

The presentments which form the basis of the indictments are replete with detail, unlike some earlier precedents from Pennsylvania precedents (see *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780 (1959)) and other jurisdictions where only conclusions or sketchy details are supplied and names of witnesses, for example, withheld. The variations of these substitute pre-trial vehicles serves to vary the impact of the denial of preliminary hearing, limit the precedential value of any decision of this Court and make the issues less clear than that baldly stated in the petitions.

2. The Reasons for the Classification.

The Pennsylvania requirements for impaneling an investigating grand jury, stressed by the court below in judging the reasonableness of the classification involved, make it clear that this is not a mere prosecutor's option in Pennsylvania, unlike other jurisdictions including the federal. See also *Coleman v. Alabama*, 399 U. S. 1 (1970). Such grand juries may be convened by the court only on a showing of widespread public wrongdoing, seriously jeopardizing public safety administration and confidence, and not susceptible to remedy by ordinary law enforcement procedures. This undeniably important state interest applies not only to the use of the investigating grand jury to gather evidence but also to the sequel of avoiding preliminary hearing before local magistrates or justices of the peace in cases so developed because of the very fact that such investigations impinge upon the operations of local government almost as their exclusive target.

Under the investigating grand jury circumstances, to require the Commonwealth to reexamine the same witnesses (some four hundred in this grand jury's investigations), at preliminary hearings would extend the pre-trial proceedings unduly without compensating benefit to the defendants in view of the fully detailed presentments and pre-trial discovery available. This represents not only a legitimate state interest but a plainly reasonable distinction between these and ordinary prosecutions. See *Dandridge v. Williams*, 397 U. S. 471 (1970).

In the run-of-the-mill criminal case, the prosecution is begun on the ex parte affidavit of an interested party, the alleged victim, or a policeman whose information is largely hearsay. In such cases, the Pennsylvania rules require a preliminary hearing (unless the court allows an exception because the statute is about to run or the defendant is a fugitive). But this is a far cry from the detailed recital of

evidence based on sworn testimony and documents, finding probable cause on the oath of a majority of twenty-three grand jurors, then approved by the convening court which has the power to review the grand jury's transcript.

3. The Pre-Trial Posture of the Case.

The procedural point at which this decision occurs indicates its lack of finality in this litigation. Other pending motions[2] and trial may yet dispose of these cases on non-federal grounds and make this Court's intervention unnecessary, even at the conclusion of the trials. The pre-trial posture also makes it impossible to assess the actual impact of the absence of preliminary hearing upon the potential trial.

The opinions of a majority of this Court in *Coleman v. Alabama, supra,* indicated the appropriateness of such pragmatic testing in determining the denial of counsel-equal protection question in that case, but this record only brings the cases to indictment. Post indictment discovery procedures under the Pennsylvania rules and their application to cases in which no preliminary hearing is held are an uncharted area in Pennsylvania law.[3] The future of this litigation could so alter its course that the measurable difference in pre-trial advantages may be arguably very slight at the time the case comes to trial.

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[2] See footnote 11 to Opinion of Pennsylvania Supreme Court; Steinberg Petition, page 17.

[3] See footnote 28 to Opinion of Pennsylvania Supreme Court; Steinberg Petition, page 31.

CONCLUSION.

For the foregoing reasons, respondent respectfully submits that the Petitions should be denied.

Respectfully submitted,

JOHN ROGERS CARROLL,
Special Assistant District Attorney,
JAMES D. CRAWFORD,
Deputy District Attorney,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney,
Counsel for Respondent.